

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 0085 OF 2016
(High Court Action No: HAC 0075 of 2014 Ltk)

BETWEEN : SUDESH ANAND KISHOR
Appellant

AND : THE STATE
Respondent

Coram : Chandra, RJA

Counsel : Mr M Fesaitu for the Appellant
Mr S Babitu for the Respondent

Date of Hearing : 21 May, 2019

Date of Ruling : 9 July, 2019

RULING

- [1] The Appellant was charged with two counts of Rape contrary to sections 149 and 150 of the Penal Code.
- [2] After trial when the Assessors brought in a unanimous opinion of guilt the learned High Court Judge concurred with that opinion and convicted the Appellant.

- [3] The Appellant was sentenced on 6th May 2015 to 13 years imprisonment with a non-parole period of 12 years imprisonment.
- [4] The victim who was adopted and living with the de facto partner of the Appellant was raped by the Appellant on several occasions during the years 2010 and 2011. The victim had been 9 years old.
- [5] The Appellant made an application seeking leave to appeal out of time on 9th June 2016. Subsequently the Appellant on advice from the Legal Aid Commission filed an amended notice of appeal together with an affidavit where he sought to explain the delay in filing his appeal.
- [6] The proposed grounds of appeal attached to his application are as follows:
1. The learned Trial Judge's direction to the Assessors on prior inconsistent statements has caused a substantial miscarriage of justice in that:
 - i) The direction is a misdirection as it is not inconsistencies with the police statements but that of an omission on the police statements; and
 - ii) The direction if taken in its entirety is inaccurate and inadequate relating to the weight to be attached.
 2. The Learned Trial Judge did not properly direct the Assessors on how to approach the weight or probative value attached to the Appellant's confession in the caution interview and charge interview.
 3. The learned Trial Judge erred in law and in fact by inadequately directing the Assessors on the alibi defence taken up by the Appellant that he was elsewhere at the alleged time the offences is said to have been committed therefore causing substantial miscarriage of justice.
- [7] The application seeking extension of time is late by about 11 months. The reason that the Appellant has given for the delay is that he did not have his court documents as the documents had been kept at the Legal Aid Commission Office and had not been returned

to him. He had taken steps to appeal with the assistance of a cousin of his who had been an inmate at the same prison.

- [8] The delay in filing the appeal is substantial and the reason given for the delay is not satisfactory. However, it has to be seen whether there are any merits in the grounds of appeal adduced on his behalf.
- [9] In his first ground of appeal it has been submitted that though the learned Trial Judge had directed the Assessors on inconsistent statements at paragraph 53 of his summing up, he had referred to instances where two of the witnesses, the victim and her adoptive mother had stated about matters which they had not stated to the Police when making their statements to the Police.
- [10] It was submitted that they were really omissions and not inconsistencies as referred to by the learned Trial Judge and therefore the directions to the assessors were incorrect.
- [11] The decision in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) was cited to support the proposition that the direction regarding inconsistencies or omissions should be made on the basis as to whether such inconsistencies or omissions affect the credibility and the weight to be attached to the evidence.
- [12] It is urged that the failure by the learned Trial Judge to give directions to the assessors on the basis of **Nadim v State** affects the credibility of the evidence of the two witnesses.
- [13] This position can be clarified when the entire case record is available with the entire transcript of the evidence and therefore I would consider there to be merit in this ground of appeal.
- [14] The second ground of appeal is regarding the directions of the learned trial regarding the confession of the Appellant which was ruled to be admissible after the voir dire inquiry.

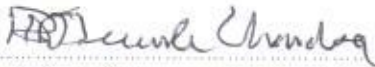
- [15] It has been submitted that the learned trial Judge's directions were inadequate, citing the decision in Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017) to the effect that had an adequate direction was given regarding the weight or probative value of the confession, overall, the Assessors would have been in a better position to assess for themselves, what weight was to be placed on the confession if they were to accept that the Appellant had made the confession.
- [16] At paragraph 54 of the summing up the learned trial Judge had referred to the fact as to how the prosecution and the defence were relying on the confession. That the prosecution was saying that they could rely on the confession, while the defence was saying that the confession was not given voluntarily. That they should disregard it, if they thought that it was not obtained voluntarily, even if it was true.
- [17] I would consider the direction given by the learned trial Judge as being adequate and therefore there is no merit in this ground of appeal.
- [18] The third ground of appeal is regarding the defence of alibi taken up by the Appellant.
- [19] It is submitted on behalf of the Appellant that the directions on the defence of alibi was inadequate and has cited the decision in Ram v State [2015] FJCA 131; AAU0087.2010 (2 October 2015) to the effect that when an accused relies on the defence of alibi, the assessors should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to the convict the accused.
- [20] The learned Trial Judge in his summing at paragraph 59 has stated that the Appellant's evidence was stated that he was elsewhere during the period that he was alleged to have committed the offences and went on to state that the burden of proving the accused's guilt remains with the prosecution at all times.
- [21] In the submission on behalf of the Appellant it is also stated that it is not certain whether the Appellant had filed a notice of alibi, which can be clarified only with the case record. If the rule regarding alibi had been complied then it would appear that the direction in paragraph 59 would not be adequate. Therefore I consider this ground to have merit.

[22] Since I consider grounds 1 and 3 to have merit, I would grant the Appellant extension of time regarding his application to file his appeal.

Orders of Court:

1. *Application for extension of time to appeal against conviction is granted.*
2. *Appellant to file amended notice of appeal within 28 days.*




Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL